Supreme Court of the United States

OCTOBER TERM, 1906.

No. 755 [illegible] 67

JOHN MACINTYRE, JR., ET AL.

vs.

THE CANTON INSURANCE COMPANY, LIMITED, ET AL. AND CLAIMANT OF STEAMSHIP "PLYMOTHIAN."

ON PETITION OF JOHN MACINTYRE, JR., ET AL. FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION AND BRIEF.

ROBERT M. HUGHES, *Proctor.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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To the Honorable Supreme Court of the United States:

The petition of John MacIntyre, Jr., Thomas C. MacIntyre, James Allen MacIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann

Blenkinsop, Michael J. Wilkinson, Susan Weeks, Richard Leitch, and the British Steamship Investment Trust, Limited, respectfully shows to this honorable Court as follows:

The petitioners are owners of the British steamship *Victory*, which on her way into Norfolk about 4.15 p. m. November 12, 1891, collided with the British steamship *Plymothian*. The *Victory* was coming in light on a flood tide. The *Plymothian* had just finished coaling at Lambert's point and was starting to sea. The collision occurred near buoy No. 7, between Craney Island light-house and Lambert's Point pier. The vessels came together with the bow of the *Victory* against the port side of the *Plymothian*. The result was that the *Plymothian* sank and that a large hole was made in the starboard bow of the *Victory*, entering at the starboard side and almost going through the port side, causing the plates on the port side to bulge outwards, but, the *Victory* being light, the injury was above the water line. The *Plymothian* was loaded with cotton, which was damaged by water. The *Victory* was damaged to the extent of over $14,000 and the *Plymothian* to the extent of over $41,000, the cargo of the *Plymothian* being damaged about $72,000.

The petitioners promptly libeled the *Plymothian* and the owners of the cargo of the *Plymothian* libeled both the *Victory* and *Plymothian*. These libels, however, were merged into the limited liability proceeding that each vessel took immediately thereafter.

The claim of the *Victory* as to the facts of the collision is that she weighed anchor in Hampton Roads at 3.30 and started to Norfolk; that she met several steamers which gave her two whistles, which she accepted, thus placing her on the eastern side of the channel; that south of Craney island there were three schooners going down the river, forcing her to remain on the eastern side (as crossing to the other side would have involved crossing their bows and unnecessary danger); that the eastern side was clear and that

she came up, having reduced her speed just before reaching Craney island; that just after passing Craney Island lighthouse she saw a steamer on the western side of the river near the Merrimac buoy; that at this time the vessel was three or four points on her starboard bow; that she gave this steamer two whistles, the vessels being then some distance apart; that the steamer answered so that the master of the *Victory* saw two puffs of steam, but only managed to hear one whistle on account of its imperfections; that, to make things more certain, the *Victory* repeated her signal of two whistles, but the other vessel commenced to show by her movement that instead of keeping down the western side of the channel she was porting, thus crossing to the eastern side of the channel and throwing herself across the bows of the *Victory;* that as soon as those on board of the *Victory* observed this porting they reversed and gave danger signals; that they were not able to port themselves on account of a schooner which was on the *Victory's* starboard bow, and which would have been run over; that the other vessel continued to come ahead; that at the time of the collision the *Victory* had about killed her headway in the water (though it is possible that with a flood tide she had not killed her way over the ground); that the *Plymothian* ran across the *Victory's* bows, driving a piece of her plates through from starboard to port, and that the nature of the injury to the *Plymothian* was such that she was beached and sunk.

The contention of the *Plymothian* is exactly the opposite. They insist that they came out from the pier at Lambert's point and hugged the eastern line of the channel. They insist that they gave the first whistles, being a single signal repeated twice, and that the *Victory* crossed the signal by giving two whistles. They insist the *Victory* was not on the eastern side of the river coming in. They insist that she was proceeding too rapidly, and that she did not back until just before the collision, and they also insist that

they did back, and had some sternway at the time of the collision.

The district court decided that the *Victory* was solely to blame for the collision. It based its opinion upon the position that the International Rules of 1885, and not the rules of navigation laid down in section 4233 of the Revised Statutes and the supervising inspector's regulations, governed in the waters where the collision took place; that the *Victory* violated article 21 of the International Rules, requiring steamers in narrow channels to keep on the starboard side (a rule not found in the Revised Statutes or the supervising inspector's regulations), and that this was the proximate cause of the collision.

The court, in reaching this decision, expressly held that the port-helm rule (No. 15 International, No. 16 Federal) did not apply, as the vessels were not meeting in such direction as to involve risk of collision, nor did it blame the *Victory* on the score of signals or speed.

It found no fault with the *Plymothian* at all, although even according to the evidence of the *Plymothian* it had given its first signal to the *Victory* when they were a mile and an eighth apart, and did not reverse until, according to their testimony, the *Victory* had crossed signals with them and gotten within two or three hundred yards (Mardon, R., 265), and although the photographs show that at the time of collision the *Plymothian* was moving faster than the *Victory*. Nor did it find fault with the *Plymothian* for her imperfect lookout, although their own testimony showed that her navigators did not hear the first signal of the *Victory*, and did not see a schooner that was in front of them in plain sight.

From this decision the owners of the *Victory* appealed to the circuit court of appeals at Richmond, and the owners of the cargo of the *Plymothian* also appealed, because the *Victory* alone was held in fault and they were deprived thereby of all remedy against the *Plymothian*.

The circuit court of appeals held that the *Victory* was in fault for not taking the western side of the channel; held also that the International Rules governed these waters, and that she therefore violated article 21 of these rules; and went still further, and held the remarkable proposition that the Federal rules embodied in section 4233 contained a similar rule requiring vessels to keep to the starboard side of the channel or, as the court expresses it, to keep to the right. It does not cite this supposed rule from section 4233, but the petitioners presume that it has confused the port-helm rule with article 21 of the International Rules and held them synonymous, though no greater mistake could possibly be made, the district court having rightly held that the port-helm rule did not apply, as the vessels were not moving in such direction as to involve risk of collision. The circuit court of appeals, however, reversed the decision of the lower court as to the *Plymothian*, and held that the *Plymothian* was also in fault. The context of the opinion would rather indicate that the fault which they ascribe to the *Plymothian* was her failure to back in time. They speak of this as a very venial fault, "an act of omission," and they characterize the action of the *Victory* in not keeping on the starboard side by some very emphatic adjectives.

Accordingly they held both were in fault, but thought the fault of the *Victory* the greater, and they required the *Victory* to pay her entire bond, amounting to $67,500, and the *Plymothian* to simply make up the deficiency to the cargo-owners, a deficiency which, including interest, aggregated about $20,000, and they laid down the novel doctrine that a court in its discretion has power, if it thinks one vessel more in fault than another, to divide the damages between them unequally, and not to follow the rule of half damages, which they admit to be almost universal.

The petitioners appeal to this Court to review that decision, as it contains two questions, not simply of national, but

of international importance, namely, what waters are controlled by the International Rules, and what is the proper rule for dividing the damages where both vessels are in fault, even though the fault of one may exceed that of the other.

Many questions were discussed during the progress of this long litigation which have lost their importance, in view of the ground taken by the district court and the court of appeals in their opinions. As they are mainly questions of fact, it would serve no useful purpose to go into them elaborately, and therefore they will be reviewed as briefly as possible for the mere purpose of placing the Court in possession of the history of this litigation.

The first of these questions was whether, assuming for the moment the truth of the facts as claimed by the *Victory*, she was right in starboarding her helm.

DID THE PORT-HELM RULE APPLY?

According to our contention, when the *Plymothian* came out from Lambert's pier and swung around into the channel, the tide being flood and therefore sweeping her up the river, she necessarily went over, not of course to the western edge, but into the western half of the channel—that is, west of mid-channel—and in this position was three or four points on the *Victory's* starboard bow, at which time the *Victory* gave her two signals. It was contended in the lower court that even on this state of facts, if true, they were meeting end on, and the *Victory* should have given her one whistle and applied the port-helm rule.

That rule is in the following language:

"If two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass to the port side of the other."

This rule has been frequently before the courts, and the conclusion has been that vessels are not meeting end on unless they are in such position that, if at night, each would see both colored lights of the other. As long as they are moving on courses which, if at night, would expose green to green or red to red, it is not a case where the rule applies.

This understanding of the law is universal among courts and seamen, and is well expressed in the old couplet:

> "Green to green, or red to red,
> Perfect safety, go ahead."

When vessels are moving on courses so they will clear each other if each holds its course, the law does not require them to swing around and each cross the other's path for the mere sake of a port helm.

Marsden, in his admirable work on collisions, says that the indiscriminate application of the port-helm rule has been a fruitful source of collision (p. 422).

When vessels are meeting each other dead ahead or slightly on each other's port bow, then the rule undoubtedly is that each must port; but when each is on the other's starboard bow as much as a point or more, then, as there is no risk of collision while that position is maintained, the rules of the road not only justify, but require that they shall pass each other starboard to starboard.

This is carried out in the navigation of our local waters by rule 1 of the Pilot Rules for Lakes and Seaboard, prescribed by the supervising inspectors.

That rule is in the following language:

"When steamers are approaching each other head and head, or nearly so, it shall be the duty of each steamer to pass to the right or port side of the other, and the pilot of either steamer may be first in determining to pursue this course, and thereupon shall give, as a signal of his intention, one short and distinct blast of his steam whistle, which the pilot of the other steamer shall answer promptly by a similar blast of his whistle, and thereupon such steamers shall

pass to the right, or port side, of each other. But if the course of such steamers is so far on the starboard of each other as not to be considered by pilots as meeting head and head, or nearly so, the pilot so first deciding shall immediately give two short and distinct blasts of his steam whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his steam whistle, and they shall pass to the left or starboard side of each other.

"NOTE.—In the night steamers will be considered as meeting head and head so long as both the colored lights of each are in view of the other."

In the case of the *Manitoba* (2 Flip., 241), Brown, district judge, held that this port-helm rule only applied when, if it was a case at night, each vessel would see both of the lights of the other. It was a case where the divergence was only three-fourths of a point, each being that much on the other's starboard bow, and the court held that starboarding was the proper course. This decision was affirmed both by the circuit court and by the Supreme Court.

The Manitoba, 122 U. S., 97.

The testimony of the crew of the *Victory* that they were forced to the eastern side by passing vessels was much attacked, and witnesses from two or three steamers that went down that evening were produced by the *Plymothian* to show that they had passed the *Victory* port to port. It is not a sufficient impeachment of a witness to show that in a harbor of the importance of Norfolk some steamers passed differently from his contention. The fact that the *Luray* and *Virginia Dare* passed port to port does not show that the *Louise* and *Accomac*, which were the steamers named by the *Victory's* witnesses, did not pass port to port.

DID THE VICTORY BACK SEASONABLY?

The *Victory* was also attacked on the ground that she did not stop and reverse in season. The proof on the side of the *Victory* as to this is that she gave a single signal;

that she saw a response, but could not make it out on account of its indistinctness; that she thereupon repeated her signal, and that she reversed as soon as she saw indications in the opposing vessel of swinging across her path.

The language of the backing rule is as follows:

"Every steam vessel when approaching another vessel so as to involve risk of collision shall slacken her speed or, if necessary, stop and reverse."

According to the testimony of the *Victory*, confirmed by some of the witnesses for the *Plymothian*, she had already slowed down. She did not, therefore, have to stop and reverse, under the very letter of the rule, until it was necessary, and it was not necessary until this eccentric movement of the *Plymothian* was developed. At that time it was too late, as far as the *Victory* was concerned, for she was coming in with a flood tide of two knots, and therefore took a much longer time to kill her headway than the *Plymothian*, which had just started and had the tide against her. This fact made the *Victory* the favored vessel.

The Galatea, 92 U. S., 439.
The Diana (1894), A. C., 629.

WHISTLES.

The question of whistles was the one most vigorously contested in the lower court, and as to which the evidence is hopelessly in conflict.

The contention of the *Victory* is that she gave the first signal of two whistles, and that the *Plymothian* crossed her signal. The contention of the *Plymothian* is that she gave the first signal of one whistle, and that the *Victory* crossed her signal.

The contention of the *Victory* was confirmed by disinterested testimony from the steamer *Princess*, which was anchored near the collision spot, that testimony being taken

only two days after the collision, and by disinterested testimony from the barge *Storm King*, which was taken about a year after the collision. On the other hand, a very great number of witnesses were produced by the *Plymothian* at the trial three years afterwards to show that she gave the first signals. Their testimony, however, is as much in conflict with the crew of the *Plymothian* as it is with the crew of the *Victory*. The *Plymothian* claims to have given her first signal when she was about off buoy 9, at Lambert's point, and the *Victory* about off Craney Island light. At this time the vessels were a mile and an eighth apart, and the testimony of both sides is to the effect that the whistles of English steamers are inferior. The usual signaling distance, as is well known, is about a half a mile, so that it would not be an unpardonable crime if the navigators of the *Victory* did not hear this first signal.

The navigators of the *Plymothian* claim that they gave one signal, then another, then another, and finally the danger signal, and that the *Victory* answered only their third signal. The testimony of their disinterested witnesses is that they only gave two single signals to the *Victory*, and that the *Victory* answered the first, and the testimony of the navigators to the effect that they gave three single signals is contradicted by some of their own crew. Lyons, their helmsman, only heard two; Ham, one of the crew, only heard two, and Shroeder, another of their crew, only heard two. In addition, the proof shows that many salute whistles were given, that there were many tugs blowing around Lambert's point, and it was a venial fault in the crew of the *Victory* not to have heard all these whistles, which disinterested witnesses immediately around the *Plymothian* and not a mile and an eighth distant, like the *Victory*, positively swear were not given.

Neither the district nor appellate court, however, found any fault with the *Victory* on the score of her whistles.

COMPARATIVE SPEED.

Another question much discussed in the lower court was the speed of the two vessels. The witnesses for the *Plymothian* did not hesitate to make the wildest statements as to the speed of the *Victory*, some of them putting it as high as ten or twelve miles an hour.

Careful measurements will show that from Craney island to buoy 7 the distance is 1,150 yards, and from buoy 9 to buoy 7 is 750 yards. The district court in its opinion states that from Craney island up to buoy 7 is 1,200 yards, and to buoy 9 is 1,967 yards, and that the distance between the two buoys is 735 yards. This is a patent mistake, for if it is 1,967 yards from Craney island to buoy 9 and 1,200 from Craney island to buoy 7 it is bound to be 767 from buoy 7 to buoy 9. In the rough, then, we may say that the distance from buoy 7 to Craney island is one and one-half times that from buoy 9 to buoy 7. The testimony of the *Plymothian* navigators places the *Victory* off Craney island and themselves off buoy 9 when the first signals were exchanged; hence, according to their own testimony, the *Victory* moved 1,200 yards while they moved, say, 800 yards—that is, she was moving one and one-half times as fast only; but the *Victory* had behind her a current of two miles an hour, and the *Plymothian* had against her a current of the same amount. Disregarding the current entirely, if the *Plymothian* was moving at the rate of four and a half miles an hour the *Victory* was only moving at the rate of seven miles an hour, and when we take the current into account the *Plymothian* appears to have been moving through the water faster than the *Victory*.

THE VICTORY'S COURSE.

The question of the *Victory's* course was also much discussed in the lower court. The pleadings of the *Plymothian* themselves only claim that the *Victory* was in mid-channel, so that the testimony of some of their witnesses, that she was west of mid-channel, is as preposterous as their statements of her speed.

THE PLYMOTHIAN'S COURSE.

The question as to the *Plymothian's* course was also much confused. She claims that she went out from Lambert's pier, turned sharp around buoy 9, passing it within a few yards only, and kept straight down the edge of the eastern side of the channel, moving under a port helm all the time. The *Victory* claims that in coming out from the pier into the channel she necessarily went out partially across the channel. As she was 260 feet long and the tide was flood—that is, on her starboard bow—common sense would seem to sustain this claim. If a ship 260 feet long can turn sharp around a buoy as a buggy turns sharp around a street corner, she must have a fifth wheel in her like a buggy. Such vessels have not as yet been invented. Some of their own witnesses place her much further out than the eastern edge of the channel, which her navigators claim she always held. For instance, J. I. Clark, disinterested, testifies that she went out "not quite to mid-channel" (R., 389). Brown from Craney Island light saw her "about the middle of the channel" (R., 346). Ham, one of her own crew, says that in going out they headed straight across the river (R., 189). Lyons, another, speaks of receiving a certain order "when we got out in the middle a way" (R., 209). Her testimony that she hugged the eastern bank is necessarily impossible. According to these measurements, it is about 800

yards from buoy 9 to buoy 7. They claim that after they passed buoy 9 their helm was slightly a-port until shortly before the collision, when it was put hard-a-port. How did she move within 40 to 60 yards of the bank a distance of 800 yards without running aground?

These questions, however, are immaterial in view of the opinions, though the petitioners feel bound to allude to them, as they can concede nothing by silence. The important questions in the case are those which were emphasized in the opinion of the courts, namely, whether the International Rules govern the navigation of these waters, and thereby made the *Victory* so emphatically in fault as the appellate court seems to think, and whether, even if she was guilty of greater fault than the *Plymothian*, the court had any power to divide the damages according to mere caprice and not follow the rule of half damages.

The importance of the question whether these waters are controlled by the International Rules of 1885, instead of the Federal statutes and Supervising Inspector's Rules, arises from the fact that the International Rules of 1885 contain an article (No. 21) in the following language:

"In narrow channels every steamship shall, when it is safe and practicable, keep to the side of the fairway or mid-channel which lies on the starboard side of such ship."

This rule, despite the assertion of the court of appeals, has no counterpart in section 4233 or the Supervising Inspector's Rules, and yet the violation of this rule is the main fault which the court has found against the *Victory*. If, therefore, the International Rules do not apply to these waters, but the Supervising Inspector's Rules, the action of the *Victory* in the collision in taking the eastern side is vindicated, for, as is well stated in the last edition of *Marsden on Collision, page 465*—

"Questions may arise as to the application of the starboard-side rule or article 21 in waters where (as, for example, the River Thames) local rules of navigation are in force; but where there is no rule as to the side of the channel upon which ships are to navigate, it is submitted that in such case article 21 has no application, and that absence in the local rules of a rule requiring vessels to navigate on one side of the channel or the other leads to the inference that vessels are free to navigate in any part of the channel."

Hence, if those waters are governed by the Federal statutes and the Supervising Inspector's Rules, all parts of that channel were free to the *Victory*.

DO THE INTERNATIONAL OR FEDERAL RULES APPLY?

In deciding whether the rules of 1885 apply in certain waters of the United States we must look, not to the language of the rules themselves, but to the language of the enacting clause of the statute adopting them. The fact that they have rules for narrow channels or even for harbors is no indication that Congress intended them to apply unless the enacting clause shows such to have been the intention. They must have such rules, for they apply in the harbors of barbarous countries which have no rules of their own; they apply in the narrow channels of archipelagoes, which are not local waters; they apply in straits not under the dominion of any one power, and hence the fact that such rules are contained in the International Rules is no proof that Congress intended them to apply unless Congress has shown its intention that they should. The enacting clause will show that Congress expressly excluded them from applying in local waters, for it says that they shall apply "upon the high seas and in all coast waters of the United States except such as are otherwise provided for." This means except such other waters as are otherwise provided for. The waters otherwise provided for are made

sufficiently plain by the repealing clause of the statute, which says:

"All inconsistent laws are hereby repealed except as to the navigation of such vessels within the harbors, lakes, and inland waters of the United States."

Therefore the harbors, lakes, and inland waters of the United States are otherwise provided for, namely, by section 4233 of the Revised Statutes and by the Supervising Inspector's Rules, and therefore the International Rules do not apply upon them.

Yet in the face of this language, so clear that he who runs may read, the district court held (R., 453) that all tide waters navigable from the ocean with navigable depth for ocean craft are coast waters in the meaning of article 21.

It ought not to be hard to find out what is meant by coast waters. Burrill's Law Dictionary defines the coast as "the edge or margin of land next to the sea, the seashore," and the *Garden City case, 26 F. R., 775*, much relied upon by our opponents, defines coast waters as embracing "not merely waters that face the open sea, but bays, passages, inlets, and sounds formed by the islands that skirt the coast." It will require a remarkable geographer to bring the Elizabeth river within this definition. How a body of water thirty miles from the ocean, divided therefrom by a body of land twenty miles square out of sight of the ocean and connecting with it by a narrow channel commanded even by the antiquated guns of Fort Monroe, can be called coast waters passes the comprehension. Not only that, but the locality of this collision was really in a harbor.

Section 2010 of the Code of Virginia, as amended by Acts of Assembly, 1889–'90 (private), p. 623, taken from the chapter of the code establishing a board of harbor commissioners for Norfolk, Portsmouth, and Norfolk county, provides—

"The jurisdiction of said board for the purposes of this chapter shall extend to the Elizabeth river and all branches

and tributaries thereof along the water front of the cities of Norfolk and Portsmouth and Norfolk county."

In the *New York-Lawrence Collision case, 54 F. R., 542,* the right of a harbor master to anchor vessels along this spot was sustained first by the district court (decision unreported) and then by the circuit court of appeals; and yet waters within the jurisdiction of a harbor master are not harbors! A harbor is a place where vessels are accustomed to resort and moor, a safe station for ships, a place of refuge, shelter, rest, and the proof in this case is that many vessels were anchored along in this vicinity waiting their turn at a coal pier, and yet that is not a harbor!

The district judge seemed to think that some terrible consequences to commerce might happen if a vessel starting on a foreign voyage had to change from the International Rules to the Federal Rules and refuses "to dwarf the river into a local harbor subject to the provincial domination of a town council and the crude regulations of ever-changing town officials." The place of this collision was not within the harbor limits of the city of Norfolk, was not subject to the regulations of any town officials or town councils, but was under the jurisdiction of the board of harbor commissioners, a State board created for the purpose of protecting the harbor and prescribing rules for its governance. The "town council" which enacted the Federal Rules was Congress, a body designated by the judge in a late silver article as itself an international board.

This court has frequently sustained even State laws applying to local waters like harbor commissioners' rules, quarantine rules, and pilot rules, and the district court itself has found vessels in fault in this very harbor for violating rules of this very board as to speed, and for twenty years has been applying in the navigation of these waters section 4233 and the Supervising Inspector's Rules.

Nor is there anything in the contention that foreign ves-

sels are subjected to inconvenience in changing from International to Federal Rules on reaching the waters of the United States. There is not a port of any size in any enlightened country which has not special rules for its navigation. The most important are collected in the appendix of Marsden on Collision. The Rivers Thames, Mersey, Scheldt, Clyde, and many others have them. Apparently this fact has not dwarfed the growth of London, Liverpool, or Glasgow as compared to Norfolk. When vessels come into local waters they are supposed to take local pilots. The vessels in this case were both in charge of local pilots who are presumed to know the Federal Rules; hence there is no hardship in bringing them under the purview of these rules.

As was well said by Chief Justice Waite in the *Sarmatian*, *5 Hughes, 158–'9:*

"It is next insisted that as the *Sarmatian* was a British vessel, and by the laws of Great Britain sailing vessels are not required to show torch-lights, the schooner can recover, notwithstanding she exhibited hers so late. The two vessels were on American waters and not on the high seas; they were in the Chesapeake bay, and *infra fauces terræ*. A vast majority of the commerce carried on there was coastwise and local. The *Sarmatian* was subject to the operation of pilot law and within the limits of pilot service. If she had attempted to proceed without a pilot, after one could have been had, she would have been guilty of a breach of duty and liable to her shippers and insurers for any loss on that account. While the rules of navigation adopted by Congress are only intended for the government of vessels of the navy and mercantile marine of the United States, no vessel forming part of that marine can excuse herself from following their requirements while in the waters of the United States and on pilot ground simply because the vessel it meets is sailing under a foreign flag. Pilots are employed, not only to keep a vessel on her proper course, but to enable her to understand the local usages governing the navigation of the waters in which she is sailing. As the law requires a foreign vessel to have a pilot on board, it is to be

presumed he will be at his post and govern himself by the rules prescribed by the proper authorities regulating navigation in that locality. Under such circumstances every pilot has the right to believe that all vessels he meets will do what the local laws or usages require of them and act accordingly."

The fact that the International Rules of 1885 are not intended to apply is shown by their very language. Those rules, for instance, although they prescribe a full set of lights for sea-going vessels, prescribe none for river steamers. It is the Federal statutes and the Supervising Inspector's Rules which prescribe lights for river steamers. Those lights for such steamers are not only the colored lights, but the two range lights, consisting of a bright light on the stem and a bright light on the flagstaff aft, whereas the International Rules prescribe only the lights carried by sea-going vessels, namely, the two colored lights and the bright masthead light. Hence, if the International Rules governed and not the Federal Rules and Supervising Inspector's Regulations, every river steamer that runs out of this harbor is improperly rigged and has been for years, and this very district court in the case of the *Conoho, 24 F. R., 758*, held a steamer in fault for not being rigged with these range lights.

It is settled law that the soil of these waters and of Chesapeake bay belong to the State and their shell-fish and oysters to the citizens of the State, and yet we are told that they are coast waters!

In the *Cotton Plant, 10 Wall., 377*, this Court held that the waters of the Roanoke river above Plymouth were included in the term "inland waters," and repudiated the idea on which the district court based its decision that they were coast waters because they were navigable from the ocean.

The circuit court of appeals in its decision (also holding that the International Rules governed) first cites as authority the *Britannia case, 153 U. S., 130*, and says this Court held

this rule 21 binding upon vessels in the harbor of New York. The most casual examination of this case shows that this Court held nothing of the sort; that the rules of 1885 were not once alluded to in the opinion, and that the quotations were entirely from the rules contained in section 4233. The court is equally unfortunate in its reference to what it terms the *John Knox case*, *1 C. C. A.*, p. 323, where it says that the circuit court of appeals for the second circuit reached the same conclusion. The reference is meant for the *John King case*, and the circuit court of appeals for the second circuit reached no such conclusion. The International Rules were not once alluded to, and section 4233 was the only one which was quoted from.

And in the *Lisbonense*, *53 F. R., 297*, this same circuit court of appeals for the second circuit, which is represented as applying the International Rules, calls attention to the fact that the International Rules apply below the Narrows and the Federal Rules above the Narrows of New York harbor, and calls attention to various differences between them.

As for the position of this Court on the subject, it not only did not apply the International Rules in the *Britannia case*, but in the subsequent case of the *Breakwater*, *155 U. S., 252*, it applied section 4233 and not the International Rules, and in the very recent case of the *Oregon*, *158 U. S., at p. 204–5*, it intimates (without positively deciding) that the International Rules did not apply in waters such as those; so that no utterance of this Court or of the circuit court of appeals for the second circuit sustains the position of the court on this point.

After thus misquoting these two courts the circuit court of appeals goes on to hold that this phrase in the repealing clause, excepting harbors, lakes, and inland waters, meant the Great Lakes and their harbors and inland waters connected therewith and the inland waters at long distances from the sea. If this was the construction the word "lakes"

alone would have accomplished the purpose, and it is hard to see why the words "harbors" and "inland waters" were inserted.

It would be impossible to apply this starboard-hand rule in harbors. To require vessels going into harbors and approaching vessels at anchor to keep an unswerving course to the right is to ensure collision. Hence, the *Victory* was not at fault in the matter which has been made by both courts the pivotal charge against her.

This brings us to the discussion of the faults of the *Plymothian*. If the testimony of the *Victory* is to be believed as against her testimony, then she was the one that crossed signals and she was much the greater in fault; but for the purposes of this discussion on the question of damages we will take her own testimony, and by that two acts of negligence are clearly proved against her.

THE PLYMOTHIAN'S IMPERFECT LOOKOUT.

In the first place, her own testimony shows that she was not keeping a proper lookout. According to that testimony, her navigators did not hear the signals of the *Victory*, which her disinterested witnesses testified were given, and did not see a schooner until after the collision, which the overwhelming preponderance of testimony proved to be there. They confess to not seeing a schooner which many others saw, to not hearing what many other disinterested witnesses all around them heard, and therefore they were at fault.

The district court held that, though their lookout was imperfect, it did not contribute to the collision. It bases this on the ground that the *Victory* had no right to order the *Plymothian* to take a different course, and that therefore the *Plymothian* had no right to change her course, and that therefore, even if they had heard this first signal of the *Vic-*

tory, they would not have been justified in changing their course, and therefore their inattention was immaterial.

This position, put in plain English, is about equivalent to holding that if one vessel is in fault the other vessel not only has the right, but is in duty bound, to run her down.

It assumes that the only thing which the *Plymothian* could or should have done, in case her lookout had been more attentive, was to change her course, but this view of the district court ignores entirely the very important consideration that if she heard this first cross-signal she could have stopped and backed more promptly.

And this brings us to the other and still more serious charge against the *Plymothian*, to wit, her failure to reverse until too late.

THE PLYMOTHIAN'S TARDY REVERSING.

The crew of the *Plymothian* contend in this case that their engines had been reversed for four minutes at the time of the collision.

If they had given this statement as a mere matter of judgment we might excuse them on the ground of the well-known unreliability of such estimates, but they have laid themselves open to a more serious charge.

We charge that in order to make a case on this point they have deliberately doctored their engineer's log.

The testimony shows that this log, as is the practice, was written up on the evening of that date—that is, after the collision had occurred. It was the more incumbent upon them to write it up naturally and truthfully, but their writing up of what happened in the morning and what happened in the afternoon is on two entirely different theories. Their witnesses testify that it is usual when orders come fast together, so that all cannot be taken down, to simply say in their log "engines working to order." Accordingly we find in this log that in coming into the harbor that

morning they simply say "worked engines to order into coaling berth." On the other hand, in going out they say: "Stand by to order 4 p. m.; full speed 4.05 p. m.; full speed astern 4.10 p. m.:" ship struck 4.14 p. m.; full speed ahead 4.15 p. m., and yet their own witnesses admit that their log does not show all the orders that were given (R., 168–'9). This at once shows that their log was fabricated. If they attempted to write anything they ought to have written everything. It is unreasonable to suppose that at a moment like that, when, as one of their witnesses says, there was danger that the men in the engine-room might be killed, they should stop to note the exact time, and yet only noted the exact time of two or three things.

It is incredible for another reason. According to this testimony, the engines of the *Plymothian* were moving backwards four minutes before the collision, and yet their pleadings only claim that at the time of the collision the headway of the *Plymothian* was entirely checked, and the *Victory's* injuries show that she was moving ahead. She had a two-knot current against her, which would enable her to stop with much more ease, and yet they contend that, though they had barely gotten up steerage-way, according to some of their witnesses, having proceeded such a short distance that they had not gotten up full speed, and though they had the tide against them, they had reversed their engines for four minutes without being able to stop their ship. This, too, is absolutely preposterous. If they could not stop her in four minutes with the tide against her, then, indeed, she must have been proceeding at a rate compared to which the greyhounds of the Atlantic are nothing. This log is suspicious and incredible.

If anybody knows how quickly a steamer can be stopped, it ought to be her engineer.

Pearse, one of the engineers of the *Plymothian*, testifies (R., 182–'3):

"Q. You have stated that when that vessel is under way, full speed ahead, and orders for the engines to go full speed astern are given, that it takes some time to overcome the movement ahead before she moves backwards through the water, and you estimate that time at about a minute?

"A. *About one minute. One minute would be the outside.*"

* * * "Q. How soon will she go astern? Does that depend upon how much headway she has?

"A. Yes, sir; if she has full speed ahead it will take longer to go astern, but she will only take about a minute."

Independent of the testimony of her engineer, any one with any experience knows that it does not take four minutes to start a ship backwards in the water even from full speed. A boat that is as unwieldly as that should be condemned as a public nuisance.

Hence, this entry in the log of the *Plymothian* is false, and deliberately false. It is worse than a crime—it is a blunder. We have the right, therefore, to reject the testimony of the *Plymothian* entirely on the subject of her reversing. Moving as slowly as she was, with a head tide, she ought to have been stopped and could have been stopped, according to the testimony of her own engineer, in less than a minute, and therefore she could not have been reversed as long as four minutes. Hence, she did not reverse until just before the collision. She has a heavier burden in this respect than the *Victory*, because she had the tide to help her manœuvre and the *Victory* had the tide to oppose her.

The testimony of the *Plymothian's* crew, when they are not asked the direct question how many minutes they were reversing, shows that they reversed but a very short time before the collision. For instance, Schroder testifies that he first saw the *Victory* over his starboard bow (not his port); that the *Victory* was then "no ways off" (R., 205), and this was before any reversing at all.

Lyons says that he cannot tell how long they were reversed, but it was a little while. (R., 210.)

Wood is specially emphatic. It is to be remembered that according to the testimony of the navigators of the *Plymothian* the third whistle and the order to reverse were coincident, so that they claim that it was four minutes from the third whistle till the collision. Wood, however, says that the interval between the danger signal and collision was about the same as the interval between the other signals, which he had previously estimated at 20 to 30 seconds, and that at the time the two vessels were only 150 feet apart, so that Wood shows that the *Plymothian* did not reverse until 20 or 30 seconds before the collision and at a time when the vessels were only 150 feet apart.

And even Mardon, the master, who testifies that the danger signals, reversing, and hard-porting were coincident, says that at the time of his hard-porting the *Victory* was only from 200 to 300 yards off. He also says, contrary to the great mass of evidence, that at that time the *Victory* was coming up full speed. Hence, according to his own testimony, he did not reverse until he was within 300 yards of the collision, though his first signal had been given 1⅛ miles off and was unanswered.

The *Plymothian* certainly moved part of this 300 yards before the collision. He does not contend that when he reversed his engines she stopped in her tracks. But let us assume, for the sake of illustrating this point, that the *Plymothian*, the very second she reversed, immediately became still, or, in the language of his answer, that her headway was then entirely checked. If the *Victory* was moving at full speed at a point only 300 yards off, with a strong tide behind her, her full speed being 10 miles an hour, it would take her less than a minute to move 300 yards. If she was not at full speed, but moving at half speed or 5 knots an hour, it would take her less than two minutes to move 300 yards; hence, on Mardon's own statement, even assuming that the *Plymothian* moved not at all, his engines were reversed for less than two minutes before the collision, and yet

his log is brought into court with an entry purporting to have been made by the clock, which is a physical impossibility and a patent imposture.

The very photograph which was offered to show the injuries of the *Plymothian* proves that at the time she was going forward, for an inspection of it will show that its front edge is perfectly smooth, whereas its back edge is rolled and curled back. If she had been stationary the cut on the two sides would have been exactly similar; if she had been moving backward the front edge would show a roll. The fact that the back edge is rolled back shows that she had at least some motion across the bows of the *Victory*, and the further fact shown by our testimony and photographs that there was a hole in the starboard bow of the *Victory*, and a piece of iron had gone through that and lodged up against the other side, pressing it out, although the stem itself was not broken, shows this still more conclusively.

It is difficult to see why, in view of this act of the *Plymothian*, the circuit court of appeals should have considered the fault of the *Victory* the gravest and that of the *Plymothian* slight. The main fault found against the *Victory* was her taking the wrong side of the channel, and that this was not such a culpable one sufficiently appears by the opinion of the district judge, wherein he says:

"East of buoy 9 there is a wide space of water extending half a mile to land, but it has no navigable depth. It is deceptive, however, and, owing to the eastward bend of the channel around buoy 9 to Lambert's Point pier, navigators coming up from Craney island are apt to head directly for Lambert's Point light, thinking they are in mid-channel, when, in fact, they are more or less east of mid-channel, are unintentionally violating a cardinal rule of navigation, which enjoins them to keep on the spacious waters west of mid-channel." (R., 448–'9.)

The circuit court of appeals speaks of the negligence of the *Plymothian* as merely "an act of omission."

The line between acts of omission and commission is sometimes hard to draw and depends very much on the way you look at it. If a driver sees a child in a public road in ample time to stop and deliberately and wilfully runs over it, he is in one sense guilty only of an act of omission, but it is a novel doctrine to hold that on this account his fault is a slight one. But however this may be and however negligent the *Victory* may have been and however venial the negligence of the *Plymothian* may have been, the petitioners submit that the act of the circuit court of appeals in dividing the damages otherwise than equally is unsustained by authority and as dangerous as it is novel.

THE HALF-DAMAGE RULE.

The opinion cites but one authority to sustain its right to divide damages according to caprice, and that is the case of the *Max Morris, 137 U. S., 1.* The reference to this case is as inapposite as the reference to the *Britannia* and *John King* cases. There is not a line in the *Max Morris* case which holds or intimates that an admiralty court has any discretion as to dividing the damages in collision cases otherwise than equally where both are in fault. That was a personal-injury case, and the real question involved was whether, in case of a libel for personal injury, the collision rule of half damages applied or the common-law rule of contributory negligence allowing no damages. The court, in deciding that in such cases it could make a small award, expressly did so on the ground that it was not a collision case, and the opinion throughout assumes that in collision cases the rule is otherwise.

It is otherwise both in England and America. In the case of *The Catharine, 17 How., at p. 177,* this Court says:

"Upon this view of the case it becomes necessary to settle the rule of damages in a case where both vessels are in fault.

"The question, we believe, has never until now come distinctly before this Court for decision. The rule that prevails in the district and circuit courts, we understand, has been to divide the loss. (9 Law Rep., 30.)

"This seems now to be the well-settled rule in the English admiralty. (Petersfield *vs.* The Judith, Abbot on Sh., 231, 232; The Celt, 3 Hagg., 328, n.; The Washington, 5 Jurist, 1067; The Fiends, 4 E. F. Moore Rep., 314, 322; The Seringapatam, 5 Notes of Cases, 61, 66; Vaux *vs.* Salvador, 4 Ad. and Ell., 431; The Monarch, 1 Wm. Rob., 21; The De Cock, 5 Monthly Law Mag., 303; The Oratava, 5 *ib.*, 45, 362.)

"Under the circumstances usually attending these disasters we think the rule dividing the loss the most just and equitable and as best tending to induce care and vigilance on both sides in the navigation."

The English law is well expressed in the case of *Devaux vs. Salvador, 4 Ad. and Ell. (31 E. C. L.), 420,* where Lord Denman said:

"But the collision causes the ship insured to do some damage to the other vessel; and whenever this effect is produced, both vessels being in fault, a positive rule of the court of admiralty requires the damage done to both ships to be added together and the combined amount to be equally divided between the owners of the two."

See also *Abbot on Shipping, 230–'1.*

These decisions have been followed in numberless cases both in England and America. It is difficult to gather from them any support for the doctrine that damages can be divided otherwise than equally.

Novel as this doctrine is on authority, its dangers exceed its novelty. It is perilous to leave anything to discretion. The more definite the law, the more clearly the rights of parties are defined, the more intelligently can they be advised as to their rights, the more certainly can the result of

litigation be ascertained and the amount of litigation diminished. To allow any one of the nine circuit courts of appeal or the sixty district judges such latitude as to the proportions in which damages should be divided is to put the profession completely at sea. Certainty disappears and litigation increases. The caprice of the individual judge is substituted for the definite rules of precedent, and the remark of the old satirist that equity might as well be measured by the chancellor's foot as by the chancellor's conscience will obtain modern significance. Judicial legislation should never be encouraged, especially when it is undertaken by inferior courts.

It has been frequently said and is the modern trend of opinion that there are no degrees of negligence, and division into ordinary, gross and light has been characterized as merely the description of negligence with an epithet.

"I can see no difference between negligence and gross negligence. It is the same thing with the addition of a vituperative epithet."

Rolfe, B., in Wilson vs. Brett, 11 M. & W., at p. 116.

"It may well be doubted whether between gross negligence and negligence merely any intelligible distinction exists."

Lord Denman in Hinton vs. Dibbin, 2 Q. B., 650.

"We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. * * * And this seems to be the tendency of modern authorities."

Mr. Justice Bradley in R. Co. vs. Lockwood, 17 Wall., at p. 382, followed in Briggs vs. Spalding, 141 U. S., at p. 151.

No yard-stick can be invented by which negligence can be measured. No court can attempt to apportion its exact degrees. Even the doctrine of comparative negligence hinted at by a few courts has not met with approbation.

It is an Illinois innovation, and a distinguished text-writer has stated that it will admit of question whether or not it has not created more confusion than anything else. (*2 Wood on Railroads, last ed., p. 1506, sec. 322b.*)

This decision of the circuit court of appeals, tending to divide negligence into degrees, is therefore a step in the direction of an exploded doctrine.

Your petitioners therefore submit that the decision of the lower courts in this case is erroneous:

1. In holding the *Victory* to blame at all.

2. In holding that she violated a rule which has no existence on the inland waters of the United States.

3. In holding that her act in so doing was gross negligence.

4. In holding that she should be made to pay more than half the damages.

5. In not holding the *Plymothian* solely to blame.

And they assign this action as error.

They respectfully submit that in view of the large amounts involved in this case, and of the two exceedingly important legal questions involved, namely, as to the application of the International Rules and as to the proper rule for dividing the damages, it is pre-eminently a case in which this Court should issue a certiorari promptly settling these questions.

Your petitioners herewith file a certified copy of the record in the said cause.

The attention of the Court is called to the fact that the mandate is only suspended until November 1, and the peti-

tioners therefore feel impelled to ask a prompt consideration of this petition by the Court.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under seal of this court, directed to the United States circuit court of appeals for the fourth circuit, commanding the said court to certify and send to this Court, on a certain day to be therein designated, a full and complete transcript of the record of all proceedings of the said circuit court of appeals in the said cause, to the end that said cause may be reviewed and determined by this Court, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioners may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the provisions of said act, and that the said judgment of the said circuit court of appeals in the said cause may be reversed by this honorable Court in the particulars above mentioned.

And your petitioners will ever pray, etc.

PETITIONERS,
By ROB'T M. HUGHES,
Counsel.

STATE OF VIRGINIA,
Corporation of the City of Norfolk, } *To wit:*

Personally appeared Robert M. Hughes, who, being duly sworn, on his oath says that he is counsel for John MacIntyre, Jr., and others, the petitioners above named, and as such had personal charge for them of the case in the foregoing petition mentioned in the district court of the United States for the eastern district of Virginia and in the United

States circuit court of appeals for the fourth circuit; that he has read the petition by him subscribed, and that the facts therein stated are true to the best of his knowledge and belief.

ROB'T M. HUGHES.

Sworn to before me and subscribed in my presence this 21st day of September, A. D. 1895.

[SEAL.]

H. H. LITTLE,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

To The Port of Plymouth Steamship Company, Limited, and to The Canton Insurance Company, Limited; The Triton Insurance Company, Limited; The Indemnity Mutual Marine Insurance Company, Limited; The Atlantic Mutual Insurance Company, The London Assurance Corporation, The Copartnership of C. T. Bowring & Company, The Standard Marine Insurance Company, Limited; The British and Foreign Marine Insurance Company, Limited, and The President and Directors of the Insurance Company of North America:

Take notice that on Tuesday, October 1, 1895, we will file a petition in the Supreme Court of the United States to bring up on certiorari from the circuit court of appeals for the fourth circuit the record in the suit of The Canton Insurance Company, Limited, *et al. vs.* Claimants of Steamship *Victory* and Claimants of Steamship *Plymouthian* and Claimants of Steamship *Victory vs.* The Canton Insurance Company, Limited, *et als.* and Claimants of Steamship *Plymouthian* for the purpose of having the same reviewed and

reversed, and that on Monday, October 14, 1895, we will submit the said petition to the Court for action.

JOHN MACINTYRE, JR.,
THOMAS C. MACINTYRE,
JAMES ALLEN MACINTYRE,
CUTHBERT HUTCHINSON,
PETER ALLEN,
GEORGE Y. BLAIR,
WILLIAM H. GOULD,
JAMES BROTHERTON,
CAROLINE REA,
THOMAS W. SPENCER,
JOSEPH FRAIN,
ANN BLENKINSOP,
MICHAEL J. WILKINSON,
SUSAN WEEKS,
RICHARD LEITCH, and
THE BRITISH STEAMSHIP INVESTMENT TRUST, LIMITED,
By ROB'T M. HUGHES, *Proctor.*

Service accepted September 20, 1895.

WILHELMUS MYNDERSE,
Proctor for Canton Insurance Company, Limited, and Others.

FLOYD HUGHES,
Proctor for Port of Plymouth Steamship Company.

Office Supreme Court U. S.
FILED.
FEB 29 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED,
Appellant,

AGAINST

THE CANTON INSURANCE COMPANY, LIMITED, ET AL.,
Respondents.

No. ~~[illegible]~~ ~~353~~ 66

JOHN MACINTYRE, JR., ET AL.,
Appellants,

AGAINST

THE CANTON INSURANCE COMPANY, LIMITED, ET AL.,
Respondents.

No. ~~[illegible]~~ ~~354~~ 67

Notice is hereby given that, upon the papers annexed and upon the records in the above-entitled proceedings, we shall, on Monday, the 2d day of March, 1896, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which is hereto annexed, to the Supreme Court of the United States at the City of Washington, D. C.

New York, February 25, 1896.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Respondents.

TO WHITEHURST & HUGHES,
Proctors for the Port of Plymouth SS. Co., Ltd.

SHARP & HUGHES,
Proctors for John MacIntyre, Jr., and Others.

SUPREME COURT OF THE UNITED STATES.

PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, *Appellant*, AGAINST THE CANTON INSURANCE COMPANY, LIMITED, ET AL., *Respondents.*	No. 757.
JOHN MACINTYRE, JR., ET AL., *Appellants*, AGAINST THE CANTON INSURANCE COMPANY, LIMITED, ET AL., *Respondents.*	No. 758.

Now come The Canton Insurace Company, Limited, The Triton Insurance Company, Limited, The Indemnity Mutual Marine Insurance Company, Limited, The Atlantic Mutual Insurance Company, The London Assurance Corporation, C. T. Bowring & Company, The Standard Marine Insurance Company, Limited, The British and Foreign Marine Insurance Company, Limited, and the president and directors of the Insurance Company of North America, by Wilhelmus Mynderse, their advocate, and move this Honorable Court to advance the above-entitled causes upon the calendar of this Court and to assign a day for the argument thereof.

WILHELMUS MYNDERSE,
Advocate for Respondents.

SUPREME COURT OF THE UNITED STATES.

PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, *Appellant*, AGAINST THE CANTON INSURANCE COMPANY, LIMITED, ET AL., *Respondents.*	No. 757.
JOHN MACINTYRE, JR., ET AL., *Appellants*, AGAINST THE CANTON INSURANCE COMPANY, LIMITED, ET AL., *Respondents.*	No. 758.

Memorandum in Support of Motion.

These causes came into this Court under writs of *certiorari* issued out of this Court, in November, 1895, to the United States Circuit Court of Appeals for the Fourth Judicial Circuit.

The causes arose out of a collision occurring in the Elizabeth River, near Norfolk, Virginia, November 12, 1891, between the steamers *Plymothian* and *Victory*, by reason of which collision both steamers sustained injury, and the cargo of the *Plymothian* was greatly damaged.

Thereupon an action was brought by the Canton Insurance Company, Limited, and others, as insurers and owners of the cargo of the *Plymothian* against the two steamers in the

District Court of the United States for the Eastern District of Virginia.

Thereupon the Port of Plymouth Steamship Company, Limited, owner of the steamer *Plymothian*, and John MacIntyre, Jr., and others, owners of the steamer *Victory*, instituted proceedings for a limitation of their liability, and at the same time contested the question of fault in respect to the said collision.

By the decree of the District Court the steamer *Victory* was held solely responsible for the collision, and distribution of the amount of her appraised value, to wit, $65,000, was directed to be made between the said Port of Plymouth Steamship Company, Limited, and the said Canton Insurance Company, Limited, and others.

Upon appeal to the United States Circuit Court of Appeals the decree of the District Court was reversed, and it was held that the collision was due to the fault of both the *Plymothian* and the *Victory*, and a decree was entered that the respondents herein recover their full damages against the steamer *Victory* to the extent of her value, and that they recover any of their damages then remaining unpaid from the steamer *Plymothian*.

The amount of damages so awarded to the respondents herein aggregates, with interest, to upwards of $90,000.

After the entry of said decree, said Port of Plymouth Steamship Company, Limited, and the said John MacIntyre, Jr., and others, filed their respective petitions in this Court for a writ of *certiorari*.

The said Port of Plymouth Steamship Company prayed for the issuing of such writ upon the grounds :

(a) That the *Plymothian* had been denied the benefit of an exemption in certain of her bills of lading, relieving her from responsibility for the fault of the pilot and for the error of judgment or neglect of the navigators of the vessel, she claiming moreover that by virtue of a further provision in the said bills of lading all questions should be adjusted and decided under English law.

(b) That the provision in the decree of the United States

Circuit Court of Appeals for an unequal division of damages against the *Victory* and *Plymothian* was extraordinary.

The said John MacIntyre and others prayed for the issuing of such writ upon the grounds:

(a) That the International Rules of navigation of 1885, which had been held by the Court applicable, did not cover navigation upon the Elizabeth River or other inland waters of the United States.

(b) That the damages arising from the collision had been unequally apportioned upon the steamers *Victory* and *Plymothian* with such result that the *Victory* bears a far greater proportion of the total loss than she would bear under the usual rule of equal apportionment among wrongdoers.

The respondents submit that as owners and insurers of the cargo of the *Plymothian* they are entirely without fault, and that it is a serious burden to them to be still further delayed in the collection of the amounts due them.

They further submit that an important question involved upon the hearing in this Court is the question as to the division of damages between two vessels, both of whom have, by their fault, contributed to the collision. Such damages have, so far as respondents can ascertain, always, with a single exception, been apportioned equally upon the wrongdoers to the extent of their ability, unequal apportionment being made only when necessary to give complete indemnity to the innocent sufferer. In this case, however, the greater portion of the loss has been put upon the steamer *Victory*, although the steamer *Plymothian* was of more than sufficient value to pay one-half of the loss. The rule of apportionment of damages is one of great public interest, and one affecting a large number of cases. It is important, therefore, that the true rule should be determined by this Court at as early a day as practicable.

Another question involved in these cases, which is of great interest, and affects a large number of cases, is that of the application of the International Rules of 1885 to rivers and inland waters.

Another question of great public interest, and one affecting a large number of cases, is whether a provision exempting a carrier from the consequences of the negligence of his servants, and providing for the determination of that question by the application of foreign law, is valid.

None of these three questions have been passed upon by this Court, and there is a difference in the rulings of District Courts and of the United States Circuit Court of Appeals throughout the country in respect to each one of the questions.

The records from the United States Circuit Court of Appeals have been filed in this Court, and a sufficient number of copies are in print for the hearing of the cause.

Wherefore the respondents pray that these causes may be advanced upon the calendar and set for trial.

WILHELMUS MYNDERSE,
Advocate for Respondents.